The Supreme Court 2013: What’s At Stake For 50+ In America
A Preview of the 2013 Term

ERISA, Employee Benefits, and Investor Protection
Mary Ellen Signorille
Jay E. Sushelsky

Employment
Daniel Kohrman
Laurie McCann
Thomas Osborne

Housing, Consumer and Low Income
Jean Constantine-Davis
Barbara Jones
Mariam Morshedi
Julie Nepveu
Susan Ann Silverstein

Health
Kelly Bagby
Iris Gonzalez
Andrew Strickland
Kenneth Zeller

Disability
Daniel Kohrman
Julie Nepveu

Stuart Cohen, Senior Vice President of Legal Advocacy
THE SUPREME COURT 2013:
WHAT’S AT STAKE FOR PEOPLE 50+ IN AMERICA
A Preview of the 2013 Term

By

AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060

ERISA, Employee Benefits, and Investor Protection
Mary Ellen Signorille
Jay E. Sushelsky

Health
Kelly Bagby
Iris Gonzalez
Andrew Strickland
Kenneth Zeller

Employment
Daniel Kohrman
Laurie McCann
Thomas Osborne

Housing, Consumer, and Low Income
Jean Constantine-Davis
Barbara Jones
Mariam Morshedi
Julie Nepveu
Susan Ann Silverstein

Disability
Daniel Kohrman
Julie Nepveu

Website: www.aarp.org/litigation
On Twitter: @AARPCares, #AARPAFL

Stuart Cohen, Senior Vice President of Legal Advocacy
THE SUPREME COURT 2013:
WHAT’S AT STAKE FOR PEOPLE 50+ IN AMERICA

A Preview of the 2013 Term

AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2060
Website: www.aarp.org/litigation
On Twitter: @AARPCares, #AARPAFL

AARP Foundation is working to win back opportunity for struggling Americans 50+ by being a force for change on the most serious issues they face today: housing, hunger, income and isolation. By coordinating responses to these issues on all four fronts at once, and supporting them with vigorous legal advocacy, the Foundation serves the unique needs of those 50+ while working with local organizations nationwide to reach more people, strengthen communities, work more efficiently and make resources go further.

AARP Foundation Litigation initiates and supports litigation protecting the rights of people 50+ and is responsible for carrying out the judicial advocacy activities of AARP and AARP Foundation, focusing on age and disability discrimination in employment; employee benefits; housing; health; investor protection; consumer protection; and issues affecting low-income persons. AARP Foundation Litigation has already filed or intends to file amicus briefs in most of the cases discussed herein. This Supreme Court Preview is undertaken as part of the education and advocacy efforts of AARP Foundation and discusses cases that will have significant impact on older people.

News media and others may quote extensively from this publication as long as appropriate attribution is given to AARP. Media inquiries should be directed to AARP Media Relations at (202) 434-2560.
# TABLE OF CONTENTS

## INTRODUCTION ................................................................................................................................. 1

## CASES – 2013 TERM .......................................................................................................................... 3

### Employment

*Madigan v. Levin* ................................................................................................................................. 3

### ERISA, Employee Benefits, and Investor Protection

*Heimeshoff v. Hartford Life & Accident Insurance Co. and Wal-Mart Stores, Inc.* .......................................................... 7

*UBS Financial Services Inc. of Puerto Rico v. Unión de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan* .......... 11

*Chadbourne & Parke LLP v. Troice, Willis of Colorado Inc. v. Troice, and Proskauer Rose LLP v. Troice (consolidated cases)* ............ 15

### Housing


### Consumer

*Mississippi ex rel. Hood v. AU Optronics Corp.* ...................................................................................... 23

### Campaign Finance

*Mccutcheon v. Federal Election Commission* ............................................................................................ 27

## WHAT THE FUTURE HOLDS ............................................................................................................. 31

### Employment ......................................................................................................................................... 31
### Health .................................................................................................................................................. 31
### ERISA, Employee Benefits and Investor Protection ............................................................................... 37
### Disability ............................................................................................................................................... 39
### Consumer ............................................................................................................................................... 41
### Housing ................................................................................................................................................ 41
### Voting and Campaign Finance ............................................................................................................ 42
### Litigation Rules And Procedures ........................................................................................................ 44

## CONCLUSION ....................................................................................................................................... 47
INTRODUCTION

When the Supreme Court recessed at the end of June, it had granted 42 petitions for certiorari, putting the Court on pace to hear between 75 and 80 cases for the 2013 Term. Of the pending petitions for certiorari, the court has requested the views of the government in nine cases on whether the petition should be granted.

For the 2013 Term the Court has granted certiorari on a wide variety of cases that AARP believes may impact people over age 50. Some of the cases address questions left unanswered by previous Supreme Court decisions. Other cases involve substantive rights. Still others involve procedural issues such as statute of limitations and the appropriate standard of review of defendant actions which can all but determine whether a lawsuit will be brought at all.

The What the Future Holds section discusses both the pending petitions for certiorari that AARP is following and other issues working their way to the Court. Many of those petitions reflect issues that are analogous to the issues in cases in which the Court has already granted certiorari, so we believe that many of the pending petitions may also be granted.
EMPLOYMENT

WHETHER THE SEVENTH CIRCUIT ERRED IN HOLDING, IN AN ACKNOWLEDGED DEPARTURE FROM THE RULE IN AT LEAST FOUR OTHER CIRCUITS, THAT STATE AND LOCAL GOVERNMENT EMPLOYEES MAY AVOID THE FEDERAL AGE DISCRIMINATION IN EMPLOYMENT ACT’S COMPREHENSIVE REMEDIAL REGIME BY BRINGING AGE DISCRIMINATION CLAIMS DIRECTLY UNDER THE EQUAL PROTECTION CLAUSE AND THE CIVIL RIGHTS ACT OF 1871?

Madigan v. Levin,
692 F.3d 607 (7th Cir. 2012),

Madigan v. Levin will decide whether the Age Discrimination in Employment Act (ADEA) provides the exclusive vehicle for asserting federal age discrimination claims: that is, whether the ADEA precludes claims of age discrimination under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the Civil Rights Act of 1871.

The Attorney General of Illinois, Lisa Madigan, the Office of the Illinois Attorney General, and the State of Illinois (Petitioners) challenge the Seventh Circuit’s decision that claims asserting violations of constitutional rights brought under 42 U.S.C. § 1983 (§ 1983) are not precluded by the ADEA. Petitioners contend that Congress intended the ADEA to be the exclusive federal remedy for age discrimination, including violations of the Equal Protection Clause.

Until the Court of Appeals decision in this case, Levin v. Madigan, 692 F.3d 607 (7th Cir. 2012), six federal circuit appeals courts had ruled that Congress, in enacting the ADEA, had established such a comprehensive regime for addressing workplace age bias, that it must have intended to preclude public employees from suing under the Constitution and § 1983. The Seventh Circuit ruled otherwise, finding the ADEA’s enforcement scheme, without more,
inadequate to demonstrate Congress’ intent to foreclose remedies nearly 150 years old.

Respondent Harvey Levin is a former senior employee in the Consumer Fraud Bureau of the Illinois Attorney General’s Office. The Chief of Consumer Protection hired Levin as an Assistant Attorney General in September 2000 and promoted him in 2002 to Senior Assistant Attorney General. Levin’s job performance reviews consistently met or exceeded expectations during his entire tenure at the Illinois Attorney General’s Office. However, in May 2006, Levin, age 62, was fired and replaced with a female attorney in her thirties. Two other male Assistant Illinois Attorneys General, both age 50 or older, also were replaced by individuals Levin alleges were younger and less qualified.

In August 2007, Levin filed age and sex discrimination claims in federal court under the ADEA, 29 U.S.C. § 621, and Title VII, 42 U.S.C. § 2000e. In addition, Levin took the unusual and far-sighted step of asserting constitutional claims because he had doubts about his ability to pursue claims under the ADEA and Title VII. As he expected might occur, the trial court dismissed his ADEA and Title VII claims because it found he was exempt from coverage under identical text in both laws applicable to persons in high-ranking, “policy-making level” jobs. See 29 U.S.C. § 630(f) (ADEA) and 42 U.S.C. § 2000e(f) (Title VII).

Defendants had also argued that a litigant may not bring a § 1983 claim to assert rights that are addressed in a federal statute that sets forth a comprehensive remedial scheme. That is, if Congress enacts a statute with comprehensive means for vindicating civil or other rights, then § 1983 is not available as an alternative path to the same relief.

Section 1983 provides:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, . . . .

It is well-settled that § 1983 may not be used to secure rights under a statute that does not itself provide for enforcement of such rights. However, § 1983 may be invoked to secure constitutional rights parallel or related to those afforded by a federal statute so long as the sheer scope of the
statute, together with other relevant factors, does not reflect Congress’ intent to occupy the field and preclude enforcement of related or parallel constitutional rights.

Defendants claimed that allowing an employee to file a claim of age bias in employment under § 1983 and the Equal Protection Clause would allow the employee to bypass Congress’ carefully crafted remedial scheme set forth in the ADEA. The Seventh Circuit did not agree, stating that more is required than a comprehensive statutory scheme to prove congressional intent. The Court of Appeals cited the relevance of the legislative history and text of the statute at issue, as well as the statute’s context, the nature and extent of the law’s remedial scheme, and a comparison of the rights and protections afforded by the statute and § 1983. Levin, 692 F.3d at 619. Additionally, the Seventh Circuit explained that Congress frequently enacts new legal remedies that are not intended to repeal their predecessors. The Seventh Circuit adhered to this conclusion despite its acknowledgement that every other circuit that has considered the issue has reached a different conclusion.

AARP, joined by the National Senior Citizens Law Center (NSCLC), filed an amicus brief arguing that the Seventh Circuit correctly decided this case. AARP’s brief emphasizes that Congress never intended the ADEA to be the exclusive remedy for age discrimination and explained that the ADEA provides a floor, not a ceiling of protection for victims of age bias in the workplace. Significantly, a favorable ruling in Madigan v. Levin would revive the rights of state employees to seek monetary relief for some acts of age discrimination, a possibility that the Supreme Court declared in Kimel v. Fla. Board of Regents, 528 U.S. 62 (2000), is unavailable via the ADEA due to the doctrine of “sovereign immunity” under the Eleventh Amendment. AARP’s brief points out to the Court that, in the wake of Kimel, enforcement of federal statutory age discrimination protections for state employees has been minimal.

In addition, as pointed out in both Levin’s brief and AARP’s amicus curiae brief, because Levin comes within a statutory exception to the coverage of the ADEA, the only question actually presented by the circumstances of the case is whether the ADEA precludes a § 1983 age-based equal protection claim by an employee who is not covered by the ADEA. Due to this situation, Levin, supported by AARP and the NSCLC, has suggested that the Court should consider dismissing the petition as improvidently granted. If the Court agrees, the answer to the Question Presented will be decided in some future case and Levin will be able to proceed on his constitutional age discrimination claim. If not, given the Court’s recent decisions that have curtailed workers’ ability to vindicate their
work place rights by bare 5-4 majorities, the Court may once again thwart the will of Congress by denying an age discrimination remedy to state employees who, due to the Court’s *Kimel v. Florida Bd. of Regents* decision in 2000, cannot sue for money damages under the ADEA.

Daniel Kohrman dkohrman@aarp.org
Laurie McCann lmccann@aarp.org
Thomas Osborne tosborne@aarp.org
ERISA, EMPLOYEE BENEFITS, AND INVESTOR PROTECTION

WHEN SHOULD A STATUTE OF LIMITATIONS ACCRUE FOR JUDICIAL REVIEW OF AN ADVERSE DISABILITY BENEFIT DETERMINATION UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT?


In Heimeshoff, the Court will address the question of when a statute of limitations accrues for judicial review of a benefit claim denial under the Employee Retirement Income Security Act (ERISA).

Julie Heimeshoff suffered from fibromyalgia and chronic pain. In 2005, she applied for long-term disability benefits from her employer’s plan administered by Hartford Life & Accident Insurance Co. (“The Hartford”) which was denied in December 2005. The Hartford found that she had failed to provide satisfactory proof of her disability. After an informal appeal, The Hartford issued its denial letter on Nov. 25, 2007.

The plan required Heimeshoff to file any suit within three years after the deadline for filing her “proof of loss” to The Hartford. Heimeshoff filed a lawsuit challenging The Hartford's decision on Nov. 18, 2010.

Agreeing with The Hartford’s argument that her claim was time barred, a trial court dismissed Heimeshoff’s claim. According to the court, The Hartford policy “unambiguously” provided that no legal action could be brought more than three years after the time written proof of loss is required to be furnished. The policy terms required proof of loss be submitted within 90 days after the start of the period for which claimant asserted that The Hartford owed payment.

The U.S. Court of Appeals for the Second Circuit affirmed in an unpublished decision. The Second Circuit found that the federal law addressing employee benefits, ERISA, is silent on benefit claim limitations periods and therefore does not prohibit a plan from setting both the accrual date and the
duration of a statute of limitations. Because the policy language is unambiguous, the court used the plan’s accrual rule to determine the date from which the statute of limitations should be calculated, even though the plan’s contractual limitations period began running before the participant was eligible to bring a legal action challenging her claim denial.

Heimeshoff first argues in her brief that unless Congress affirmatively specifies otherwise in a statute itself, the limitations on a federal claim does not begin to run until that claim can be filed in court; under ERISA that time is when the internal claims procedure is concluded and a wrongful benefit denial can be alleged.

Heimeshoff next contends that the Second Circuit committed three errors of law in arriving at its decision. The first mistake was that state law, not federal law, governed the question of accrual. Second, Heimeshoff contends that it was error for the court to conclude that the state insurance law framework which was applied does not require mandatory exhaustion of an internal claims procedure. Finally, she argues that the Second Circuit failed to apply the federal and state rule that where an administrative proceeding must be completed before a claimant can file suit, the limitations period for filing suit is tolled during that proceeding.

Moreover, Heimeshoff contends that the reasonableness approach for which The Hartford contends undermines ERISA’s carefully crafted remedial scheme by thwarting good faith resolution of disputes and creating the risk that the claimant’s right to file suit will be completely eliminated. In addition, she argues that a reasonableness approach would cause uncertainty and unpredictability because neither the plan administrator nor the claimant would ever know exactly when the limitations period would begin to accrue.

AARP’s brief, joined by the National Employment Lawyers Association, argues that *U.S. Airways, Inc. v. McCutchen*, 133 S. Ct. 1537 (2013), decided last Term, seems to indicate that the plan document language must control. However, the brief argued, in order to deal with the possibility that a claimant may be prohibited from bringing a lawsuit in contravention of ERISA’s requirement to exhaust internal remedies, the Court will have to imply either a bright line term or a reasonableness term into the plan. AARP’s brief reasons that it is more consistent with ERISA and the judicially created mandatory exhaustion requirement to let the internal claims process be completed before the limitations period begins to accrue. AARP’s brief also explains the problems with implying a reasonableness term into the plan: it lacks an objective standard, is inconsistent
with ERISA’s notice requirements, leading to potentially absurd results by preventing a lawsuit from ever being filed, and it provides the wrong incentives to plan administrators and claimants.

In its response to Petitioner’s brief, The Hartford argues that in this case the contract should be enforced as written and that there are no extenuating circumstances requiring otherwise. It also disputes Heimeshoff’s contentions concerning the federal law surrounding statute of limitations. Finally, The Hartford asserts that ERISA’s remedial scheme does not implicitly prohibit a contractual limitations provision.

This case will determine whether a plan’s limitations period will be permitted to conflict with ERISA’s judicially created exhaustion requirement so that participants will be forced to file a lawsuit prior to the time the claims and appeals procedure is complete. Alternatively, participants may lose their ability to file a lawsuit to protect their benefits in contravention of ERISA’s purposes of providing ready access to the courts, undercutting one of ERISA’s primary purposes.

Mary Ellen Signorille
msignorille@aarp.org
WHETHER MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE COMPLAINTS FOR FAILURE TO PLEAD DEMAND EXCUSE, PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23.1 SHOULD BE REVIEWED BY COURTS OF APPEALS DE NOVO OR REVIEWED FOR A DISTRICT COURT’S ABUSE OF DISCRETION?


In UBS, the Court will determine the proper standard the federal circuit courts of appeals should apply when reviewing district court decisions on a motion to dismiss shareholder derivative complaint for failure to plead demand excuse, pursuant to Federal Rule of Civil Procedure 23.1 (“Rule 23.1”). Petitioner UBS asks the Court to determine whether, when a board of directors adopts third-party investment advice, the board has made a business decision or failed to discharge its oversight duties as a matter of law.

Plaintiffs are pension plans that invested in four mutual funds (“Funds”). Shares of these Funds are sold only to Puerto Rico residents. Plaintiffs seek to enforce the rights of the Funds against UBS Trust Company of Puerto Rico and affiliate UBS Financial Services Incorporated of Puerto Rico (together, “the UBS defendants”), and the Funds’ boards of directors. Each fund has an identically composed board. All boards consult the same investment adviser, a division of defendant UBS Trust. Plaintiffs allege that defendant directors breached their fiduciary duties by approving large purchases of near-junk bonds from Puerto Rico’s Employee Retirement System (“ERS”) as arranged and advised by and through the UBS defendants. The UBS defendants earned millions of dollars in fees from the transactions even as the bonds, and the Funds with them, tumbled in value.

Pursuant to Federal Rule of Civil Procedure 23.1, shareholder derivative complaints must demonstrate in pleading that a defendant board is unlikely to be disposed to enforce the corporation’s interests, and that failure by shareholders to make a pre-suit demand on the board is therefore excusable. The demand excuse requirement is typically met by showing either that the board refused to address a demand on the issue, or that making such a demand would be futile.
State law governs whether demand futility is adequately pleaded. Puerto Rico adopts Delaware corporate law, which has two tests for demand futility.

The UBS district court applied a test articulated in Aronson v. Lewis, 473 A.2d 805 (Del. 1984), recognizing two avenues by which a plaintiff may plead demand futility. The first is that plaintiffs may allege facts to suggest that a majority of the directors had personal stakes in, or stood on both sides of, a transaction, which clouded their business judgment. The second is that plaintiffs can challenge the decision-making process itself. In this case, the court found only two of eleven directors to be financially interested in the bond purchase, and found none to occupy both sides of the purchase. Thus, the court held that plaintiffs failed to adequately challenge the board’s judgment. Alternatively, plaintiffs alleged that the Fund purchases were interested-director transactions, the transactions were entered into in bad faith, the directors inadequately informed themselves about the transactions, and the purchases raised doubts about the directors’ business judgment. The court dismissed these pleadings for insufficiency of the allegations to meet the pleading test.

On appeal, the First Circuit read the complaint to allege that when defendant boards took the UBS defendants' advice to purchase ERS bonds they ignored serious risks and failed to protect the Funds from losses. The lower court, it held, should have used a more scrutinizing test. Holding that the district court focused too narrowly on financial benefits to the board members when there were other likely influences on the directors due to their respective positions within the UBS “family” and Puerto Rico's own business interests, the court held that plaintiffs were required only to make allegations sufficient to suggest that outside influences were material enough to impair the directors’ judgment when responding to the merits of a shareholder’s pre-suit demand. The First Circuit noted that four of the Funds’ board members worked for UBS subsidiaries, while two others were officers of the largest managed care company in Puerto Rico, which enjoys a lucrative relationship with the UBS defendants. A majority of directors were too “close” to the transaction to be objective, the First Circuit held in reversing the lower court.

In the Supreme Court, Petitioners contend that the deferential “abuse of discretion” review of Rule 23.1 motions to dismiss for failure to plead demand excuse is justified because demand excuse is a fact-sensitive inquiry, and abuse of discretion review requires appellate courts to adopt a lower court's findings of fact. Shareholder derivative suits in particular are equitable causes of action that demand flexibility insofar as each case requires courts to balance public interest and private need. The rule granting district courts’ discretion over demand
excuse, Petitioners point out, has a century-long history. The Second, Third, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits apply an abuse of discretion standard of review in these cases.

But Respondents argue the Second, Ninth, and D.C. Circuits have expressed skepticism of the abuse of discretion standard, while the Sixth and Eighth Circuits have formally adopted a de novo standard of review. As the Second Circuit explained in *Scalisi v. Fund Asset Mgmt., L.P.*, 380 F.3d 133, 137 n.6 (2d Cir. 2004), whether demand futility has been adequately pled is a question of legal sufficiency, or a mixed question of law and fact, either of which justifies a fresh look at the whole case.

Fundamentally, UBS asks the Court to address corporate board accountability and transparency by putting on trial the quality of information about board decision-making to which shareholders can gain access. The district court deferred to the board’s business judgment to adopt third-party advice, while the First Circuit focused on the board’s failure to scrutinize the advice, following a de novo review standard. A holding in favor of defendants would create a tactical benefit for corporate boards, especially those overseeing corporations in Puerto Rico. Abuse of discretion would leave investors in Puerto Rico particularly exposed to risk of board abuses. If the review standard is to be deferential, appeal rights of investors, including pension funds, will also be less meaningful in all but a few cases. Without “silver bullets” for a majority of board members, plaintiffs will be dissuaded from litigating meritorious claims.

AARP submits that the Court should not give publicly owned companies another procedural tool to terminate shareholder derivative litigation prior to the summary judgment stage. This case is yet another attempt to reduce publicly traded companies’ accountability to shareholders seeking full and timely disclosure of information of significance to the investing public. In Puerto Rico’s unique case, UBS illustrates that strategic self-dealing and a deferential appeals process threaten investors’ rights, which in this case directly implicates the long-term solvency of public pension funds, portending dire consequences for pension beneficiaries in the future and the publicly sponsored pension systems upon which the beneficiaries are dependent.

Jay E. Sushelsky
jsushelsky@aarp.org
WHETHER THE SECURITIES LITIGATION UNIFORM STANDARDS ACT (SLUSA) PRECLUDES A STATE LAW CLASS ACTION ALLEGING A SCHEME OF FRAUD THAT INVOLVES MISREPRESENTATIONS ABOUT TRANSACTIONS IN SLUSA-COVERED SECURITIES?

WHETHER SLUSA PRECLUDES CLASS ACTIONS ASSERTING THAT DEFENDANTS AIDED AND ABETTED SLUSA-COVERED SECURITIES FRAUD WHEN THE DEFENDANTS THEMSELVES DID NOT MAKE MISREPRESENTATIONS ABOUT THE PURCHASE OR SALE OF SLUSA-COVERED SECURITIES?


In Troice the Court will address the scope of the Securities Litigation Uniform Standards Act (SLUSA) preclusion of state court class actions surrounding fraudulent misrepresentations to investors. Specifically at issue is whether SLUSA’s “in connection with” requirement is met where plaintiffs sold “covered securities” as defined under SLUSA in order to fund the purchases of limited, private placement securities offerings that are clearly not “covered securities” under SLUSA. The Fifth Circuit held that SLUSA does not apply so as to restrict the rights of individuals to bring suit under state law for violations involving these non-covered securities and that the sale of “covered securities” to fund the purchases of the fraudulently marketed securities does not meet SLUSA’s “in connection with” standard so as to trigger SLUSA’s preclusive effect. Rather, the Court stated, Congress crafted SLUSA to preserve the enforcement powers of state regulators and private enforcement initiatives under state laws.

This case involves a consolidation of three suits involving a multi-billion dollar Ponzi scheme perpetrated by R. Allen Stanford through various corporate entities. The scheme involved the sales of fraudulently marketed Stanford Investment Bank Certificates of Deposit (SIB CDs) that were rife with misrepresentations. The trial court focused on the question of whether plaintiffs’ complaint alleged the use of misrepresentations, omission, or deceptive devices in connection with the purchase or sale of a covered security. First, the district
court concluded that the SIB CDs themselves were not "covered securities" within the meaning of SLUSA because SIB never registered the CDs, nor were the SIB CDs traded on a national exchange. But that finding, the district court stated, "did not end the SLUSA inquiry."

Finding that Supreme Court and other precedent required a broad interpretation of SLUSA's "in connection with" requirement, the lower court applied a test purportedly derived from Eleventh Circuit precedent, and observed that plaintiffs had alleged two distinct factual bases connecting the fraud to transactions in covered securities. First, the district court relied upon the complaint's allegations that purchases of SIB CDs were "induced" by the misrepresentation that SIB invested in a portfolio including SLUSA-covered securities, noting that the CDs' promotional material touted that the bank's portfolio of assets was invested in "highly marketable securities issued by stable governments, strong multinational companies and major international banks."

Second, the district court found that the purported investment of the bank's portfolio in SLUSA-covered securities gave its CDs certain qualities that induced plaintiffs' purchases. The instruments were labeled CDs "to create the impression . . . that the SIB CDs had the same degree of risk as certificates of deposit issued by commercial banks regulated by the FDIC and Federal Reserve." However, they were advertised to function "[i]ke well-performing equities" by offering "liquidity combined with the potential for high investment returns." This was supposedly made possible by "the consistent, double-digit returns on the bank's investment portfolio," which stemmed, in part, from the presence of SLUSA-covered securities. The plaintiffs alleged in their complaint that had they "been aware of the truth" that SIB's "portfolio consisted primarily of illiquid investments or no investments at all," they "would not have purchased the SIB CDs." The district court therefore found that the plaintiffs sufficiently alleged that their "CD purchases were induced by a belief that the SIB CDs were backed in part by investments in SLUSA-covered securities." (Quotations from district court opinion).

Additionally, the district court found that plaintiffs' "allegations . . . reasonably imply that the Stanford scheme coincided with and depended upon the plaintiffs' sale of SLUSA-covered securities to finance SIB CD purchases." It noted that plaintiffs' claim that the fraud was a scheme targeting recent retirees who were urged to roll the funds in their retirement account into an IRA administered by SEI, of which the Trust was the custodian and which was fully invested in the CDs. The district court noted that "retirement funds come in a variety of forms that might not all involve SLUSA-covered securities," but that
"stocks, bonds, mutual funds, and other SLUSA-covered securities commonly comprise IRA investment portfolios." From this, the court stated "that at least one of the plaintiffs acquired SIB CDs with the proceeds of selling SLUSA-covered securities in their IRA portfolios," and therefore, this "modest finding" independently supported the district court's ruling that the plaintiffs' claims were precluded by SLUSA. Accordingly, the district court dismissed the action on SLUSA preclusion grounds.

On appeal, the Fifth Circuit held essentially that although the trial court had engaged in a thorough review of the law and analysis of the facts of the case, it had too broadly construed SLUSA's preclusion clause. The appellate court found that the fraudulent schemes of defendants, as alleged by the plaintiffs, were not more than tangentially related to the purchase or sale of covered securities and are therefore not sufficiently connected to such purchases or sales to trigger SLUSA preclusion. Next, the Fifth Circuit held that the fact that some plaintiffs sold some "covered securities" in order to put their money in the CDs was not more than tangentially related to the fraudulent scheme and accordingly, the sales provide no basis for SLUSA preclusion. In arriving at its holding, the Fifth Circuit analyzed the law of several sister circuits, and went on to craft its own formulation of the appropriate SLUSA "in connection with" standard which applied on the facts of this case.

AARP joined with other investor advocates in an amicus curiae brief urging the Supreme Court to affirm the Fifth Circuit's holding that where the challenged misrepresentations center on non-covered securities, a mere tangential link to transactions in SLUSA-covered securities does not create a sufficient basis to preclude state law causes of action. The substance of AARP's position, as stated in the brief, is that Congress clearly intended to leave private, limited offerings outside of the scope of SLUSA. Allowing issuers in private placements the benefits of SLUSA preclusion would not advance the purposes of SLUSA. It would only serve to create additional obstacles for defrauded investors seeking to recover their losses. The brief emphasizes that while federal securities law provides broad investor protection coverage in many circumstances, state law-based private securities litigation is also important because it provides remedies for financial wrongs not available under federal securities statutes.

Jay E. Sushelsky
jsushelsky@aarp.org
WHETHER DISPARATE IMPACT CLAIMS ARE COGNIZABLE UNDER THE FAIR HOUSING ACT?


In this case now before the Supreme Court, the Township of Mount Holly, New Jersey, challenges the rights of the residents of the Mount Holly Gardens to raise disparate impact claims under the Fair Housing Act (“FHA”). Disparate impact has been recognized as a theory of liability under the FHA in every court of appeals to consider the issue since the passage of the 1968 Act. Likewise, the Department of Housing and Urban Development (HUD), the federal agency primarily responsible for administering and enforcing the FHA, has always interpreted it to include disparate impact. The FHA prohibits discrimination in all aspects of the housing market, including eminent domain, rental, home ownership, zoning and land use, mortgage lending and the insurance industry. Proof of discrimination through disparate impact requires a showing that a particular action has adverse disproportionate effects on minorities, that is, some policies have the practical effect of discriminating based on race, family status, or some other category, and are unnecessary or unjustified. Proof that the actor had the intent to discriminate is not required under disparate impact.

Last year, the Supreme Court granted certiorari on this issue in _Magner v. Gallagher_, 132 S. Ct. 1306 (2012), but petitioner, City of St. Paul, Minnesota, ultimately dismissed its appeal before the Supreme Court was scheduled to hear oral arguments. In _Magner_, plaintiff landlords challenged the manner in which St. Paul enforced its housing code. The landlords alleged that the City enforced the code more aggressively against their properties, which in turn had a disproportionate impact on minorities in St. Paul, because plaintiffs rented largely to African-Americans. The allegations survived a motion to dismiss on a disparate impact theory under the FHA because, while neutral on its face, the lower court held such action had the effect of eliminating affordable housing for St. Paul’s African-American residents. Only months after dismissal of the _Magner_ appeal, Mount Holly Township filed its petition for certiorari.
Residents of the Mount Holly Gardens, a largely minority populated section of Mount Holly Township, have contested the Township’s plans to redevelop their neighborhood. In 2003, the Township declared the Gardens area blighted and adopted a redevelopment plan calling for wholesale demolition of the existing homes and construction of replacement homes that were unaffordable to current residents. Before the plan was implemented, the Township began purchasing properties and demolishing them, notwithstanding that some were attached to still-occupied homes, and threatening to use eminent domain if others refused to sell. Plaintiff residents first attempted to obtain remedial relief in state court, but the blight declaration was upheld. In 2008, plaintiffs brought a federal court suit against the Township’s action under the FHA’s disparate impact theory.

Plaintiffs claimed the Township’s plans for redevelopment had a disparate impact on minorities because a substantial number of the Township’s African American and Hispanic residents lived in the Gardens. Plaintiffs argued that the redevelopment plan in effect pushed minorities out of Mt. Holly Township: the amounts the Township offered as compensation for their homes would not allow Gardens residents to purchase new homes in the area. Plaintiffs sought declaratory and injunctive relief to stop the challenged redevelopment plan, monetary damages, and other compensation for the harm the residents alleged resulted from the Township’s actions.

The district court originally granted the Township’s summary judgment motion finding Plaintiffs failed to establish a prima facie case of disparate impact under the FHA. The Third Circuit reversed the district court, distinguishing disparate impact from the lower court’s disparate treatment analysis and remanding the case for consideration under a disparate impact theory. Invoking the FHA’s remedial purpose of fostering integration, the Third Circuit stated that disparate impact permits a plaintiff to first get into court “to ensure that the government does not deprive people of housing ‘because of race’ [within the meaning of 42 U.S.C. § 3604(a)].”

The text of the FHA, which largely parallels that of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA), is expected to inform the Supreme Court’s review. Notably, the language of Title VII and the ADEA have each been held to support disparate impact claims. See Griggs v. Duke Power Co., 401 U.S. 424 (1971); see also Smith v. City of Jackson, 544 U.S. 228 (2005). In contrast, the text of the FHA is silent as to whether it is sufficient for a plaintiff to show a causal relationship between the contested conduct and its effect, or whether one must show intent. The FHA also provides certain exemptions for reasonable housing restrictions which
presuppose the availability of disparate impact claims. Finally, the purpose of the FHA is similar to the purposes of Title VII and the ADEA: removal of discriminatory barriers, in one case, housing and the other, employment.

In addition to the pervasive volume of circuit court findings in favor of disparate impact claims under the FHA, HUD has always interpreted it to include disparate impact, most recently in regulations issued after full notice and comment rulemaking. The Township questions whether Congress actually gave HUD authority to promulgate this regulation, arguing that where there is no statutory ambiguity or gap, or an administrative agency’s interpretation is contrary to the plain meaning of a statute, no deference to an administrative agency is due.

AARP Foundation Litigation attorneys are co-counsel in this case representing the plaintiff Gardens residents. Most of the individually named plaintiffs within the predominantly African-American and Hispanic, lower income community are older homeowners who have paid off their mortgages and are living on fixed incomes. A holding against the Gardens residents would reverse all eleven circuits that have applied disparate impact under the FHA to these public and private interests over the course of the 55 years since the statute’s enactment, and would mean that those who were harmed by the discriminatory effects of housing policies and for which there existed less discriminatory alternatives must continue to suffer discrimination based on (among other bases) race, sex, national origin, family status, and disability.

Susan Ann Silverstein       Mariam Morshedi
ssilverstein@aarp.org       mmorshedi@aarp.org
CONSUMER

WHETHER A STATE'S PARENS PATRIAES ACTION IS REMOVABLE AS A “MASS ACTION” UNDER THE CLASS ACTION FAIRNESS ACT WHEN THE STATE IS THE SOLE PLAINTIFF, THE CLAIMS ARISE UNDER STATE LAW, AND THE STATE ATTORNEY GENERAL POSSESES STATUTORY AND COMMON-LAW AUTHORITY TO ASSERT ALL CLAIMS IN THE COMPLAINT?

Mississippi ex rel. Hood v. AU Optronics Corp.,
701 F.3d 796 (5th Cir. 2012),
Oral argument scheduled for Nov. 6, 2013.

This case addresses whether a state attorney general’s parens patriae action can be removed under the “mass-action” provision of the Class Action Fairness Act (“CAFA”), where the State is the sole plaintiff and raises only state law claims.

Between 1996 and 2006, AU Optronics and other manufacturers allegedly conspired to fix the prices of liquid-crystal display (LCD) panels, thereby increasing the price of products containing LCD panels. Asserting that AU Optronics violated the state’s Consumer Protection Act (“MCPA”) and Antitrust Act (“MAA”), the Mississippi Attorney General filed a parens patriae complaint in state court on behalf of the State and its affected citizens. AU Optronics removed the case to federal court asserting that CAFA extended federal jurisdiction over the claims because the action seeks restitution for individual citizens.

CAFA authorizes removal from state court of “any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by one or more representative persons as a class action.” 28 U.S.C. § 1332(d)(1)(B). A mass action is also removable if “monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that plaintiffs' claims involve common questions of law or fact except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy” the $75,000 jurisdictional amount requirements. 28 U.S.C. § 1332(d)(11)(A). Mass actions cannot be transferred to federal court “unless a majority of the plaintiffs in the action request transfer.” 28 U.S.C. § 1332(d)(11)(C)(I).
AU Optronics argues that the Mississippi Attorney General’s *parens patriae* action is actually a mass action in disguise that may be removed under CAFA because the individual consumers who may receive restitution are, they claim, the real parties in interest. The district court remanded the case back to state court finding that the suit was not a class action because Mississippi did not file suit under Rule 23 or similar statutes and the state’s laws explicitly prohibit class action lawsuits. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 876 F. Supp. 2d 758, 769 (S.D. Miss. 2012). Although the district court found that the suit qualified as a “mass action,” it remanded the case because the claims were asserted on behalf of the general public and therefore fell under the general public exception to CAFA’s mass action jurisdiction.

On appeal to the Fifth Circuit, Mississippi argued that it is the sole plaintiff and the real party in interest; thus the suit is not a mass action. The Attorney General is authorized by statute to assert the claims and to seek restitution on behalf of the residents of Mississippi. Even if the suit fits within the definition of a mass action, the suit is exempted under CAFA’s general public exception because the injured citizens represented “a sufficiently substantial segment” of the State’s population to establish Mississippi’s “quasi-sovereign interest” in the “economic health and well-being of the State and its citizens.”

The Fifth Circuit reversed the district court, finding that the general public exception does not apply. It found the real parties in interest included both the State and the individually injured Mississippi consumers. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012). The Supreme Court invited the Solicitor General to express the views of the United States on the appropriateness of granting certiorari. In recommending a grant of certiorari, the Solicitor General stated that the Fifth Circuit decision was in direct conflict with other circuit court decisions, precedent regarding parens patriae actions, and the principle that removal statutes should be strictly construed.

AARP filed an amicus brief, arguing that *parens patriae* actions are not mass actions and that permitting removal to federal court interferes with the state’s sovereign interests in enforcing its laws. There are significant differences between class actions and *parens patriae* actions. For example, a state attorney general does not represent individual plaintiffs, and cannot elevate the interests of a group of individuals over those of the interests of the state. In a class action, however, an attorney is required to maximize relief to the class and may not represent diverse interests. In a private lawsuit individual class members have a constitutional right to notice and an opportunity to opt out of a settlement; there are no such rights when an attorney general settles a lawsuit. Moreover, when an
attorney general files a lawsuit on behalf of the state, it is not required to prove individual injury in order to obtain monetary damages. Instead, the measure of damages for an attorney general may be disgorgement of profits gained from an illegal activity or other return to the status quo ante.

AARP also argued that removal interferes with the sovereign interests of the state in enforcement of its laws on behalf of the State and its residents. Vigilant law enforcement creates a fair marketplace, the benefits of which flow to all the residents, even if they do not receive the proceeds of a restitution remedy. These residents are as much real parties in interest as those who receive a direct monetary benefit. Treating the cases as mass actions interferes further with the will of the state legislature to create an efficient means by which the attorney general can enforce the laws. Even worse, CAFA removal will likely require that a portion of the claims – those that do not meet the $75,000 jurisdictional threshold – be tried in state court following the removal proceedings, forcing the state to try the claims in two separate proceedings. These and other logistical problems demonstrate that Congress did not intend to permit removal of _parens patriae_ actions under CAFA.

AARP’s brief highlighted the work of state attorneys general in protecting the health and safety of residents in nursing facilities and home health care by ensuring adequate staffing levels and training. State attorneys general have been at the forefront of stopping abusive lending practices that caused millions to lose their homes. They ensure that insurance and annuity products being sold are suitable and that terms of credit and banking products are fully disclosed. In these instance, states are acting in their _parens patriae_ capacity through their attorneys general. These suits should not be deemed private actions in disguise; to rule otherwise will benefit defendants who have violated state law.

The outcome of this case is important to older people and others who rely on state attorneys general to protect their safety, homes, and assets from a broad range of illegal practices.

Julie Nepveu
jnepveu@aarp.org
CAMPAIGN FINANCE

WHETHER AGGREGATE BIENNIAL LIMITS ON CONTRIBUTIONS BY INDIVIDUALS TO CANDIDATE AND NON-CANDIDATE CAMPAIGN COMMITTEES, IMPOSED BY THE FEDERAL ELECTION CAMPAIGN ACT (FECA), ARE UNCONSTITUTIONAL, EITHER BECAUSE THEY LACK A CONSTITUTIONALLY COGNIZABLE INTEREST OR BECAUSE THEY ARE UNCONSTITUTIONALLY LOW?

McCutcheon v. Federal Election Commission,
893 F. Supp. 2d 133 (D.D.C. 2012),
probable jurisdiction noted, 133 S. Ct. 1242 (February 19, 2013) (No. 12-536).
Oral argument scheduled for Oct. 8, 2013.

In their statement of issues presented to the Court, plaintiffs-petitioners in McCutcheon explain that according to the Federal Election Campaign Act (FECA):

Federal law imposes two types of limits on individual political contributions.

Base limits restrict the amount an individual may contribute to a candidate committee ($2,500 per election), a national-party committee ($30,800 per calendar year), a state, local, and district party committee ($10,000 per calendar year (combined limit)), and a political-action committee ("PAC") ($5,000 per calendar year). 2 U.S.C. § 441a(a)(1) . . . .

Biennial limits [or “aggregate contribution limits”] restrict the aggregate amount an individual may contribute biennially as follows: $46,200 to candidate committees; $70,800 to all other committees, of which no more than $46,200 may go to non-national-party committees (e.g., state parties and PACs). 2 U.S.C. § 441a(a)(3) . . . .

The McCutcheon petitioners challenge the aggregate limits on multiple grounds. They argue such limits are unnecessary, as they are addressed to problems Congress resolved long ago in amendments to the original text of the FECA. They also contend that they are intended to serve no interest that remains constitutionally cognizable after the Court’s decision in Citizens United v. FEC, 558 U.S. 310 (2010). And finally, they assert that federal biennial limits on
individual campaign contributions are onerously low and thus seriously impede the flow of political speech.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court upheld the original aggregate limits on individual campaign contributions enacted in FECA. The Court reasoned that such limits prevented campaign contributors from circumventing “base limits” by making “earmarked contributions to political committees likely to contribute to [donors’] preferred candidate[s], or huge contributions to the candidate’s political party.”

Petitioners in *McCutcheon* argue that Congress amended FECA following *Buckley v. Valeo* so as to address the circumvention problems identified by the Court, and thereby rendered aggregate limits obsolete. The Federal Election Commission (FEC) and amici supporting the agency, including AARP, respond that petitioners grossly exaggerate the dimensions of the post-*Buckley* amendments to FECA. They contend that petitioners disregard the ways that aggregate limits remain essential to advance the government interest in preventing political corruption – actual or perceived – related to huge campaign contributions, and in preventing (or at least deterring) circumvention of base limits on individual campaign contributions. Specifically, absent aggregate limits in FECA, a single donor could contribute a total of over $2.4 million to candidates of their favored party and more than $1.1 million to three federal committees and fifty state committees of the same party in a two-year election cycle. “Joint fundraising” procedures, the FEC and amici assert, permit a donor to avoid the burden of writing numerous separate checks to specific candidates and party committees, and instead, allow a donor to write a single check to a joint fundraising committee that in turn might distribute the single donation to participating party committees, and ultimately, to the donor’s preferred candidates. In turn, this would allow candidates to solicit huge (e.g., million-dollar) contributions to joint fundraising committees with an expectation that the candidates making such requests would benefit indirectly in a way the law does not permit them to benefit directly through individual contributions to their candidacy.

In short, serious danger of circumvention of “base limits” on individual campaign contributions still exists, and aggregate limits continue to serve to prevent such ruses.

Aggregate limits also are viewed by campaign finance experts as critical to preventing re-establishment of a system of permissible, unrestricted “soft money” campaign contributions, such as the Supreme Court condemned in *McConnell v.*
While *Citizens United* invalidated significant portions of the Bi-Partisan Campaign Reform Act (BCRA) addressed in *McConnell*, according to the FEC and its amici, *Citizens United* did not question *McConnell’s* analysis recognizing the dangers of corruption and the appearance of corruption that Congress intended to address via restrictions on “soft money” in Title I of the BCRA. The FEC and its amici also note that since *Citizens United*, the Court affirmed a three-judge court decision sustaining BCRA’s limits on “soft money” contributions to political parties. See *RNC v. FEC*, 698 F. Supp. 2d 150 (D.D.C.), *aff’d*, 130 S. Ct. 3544 (2010) (mem.).

AARP’s friend-of-the-court brief in *McCutcheon*, joined a large coalition of government reform groups, including Common Cause, the League of Women Voters, and the Campaign Legal Center, supporting the FEC as noted above.

Daniel B. Kohrman
dkohrman@aarp.org
WHAT THE FUTURE HOLDS

This section discusses not only pending petitions for certiorari that AARP is following (those case names are bolded), but also issues on which the Court may eventually grant certiorari. We note that several important decisions from previous Supreme Court Terms left unresolved legal issues of critical importance to older people. And, of course, as lower courts issue decisions and legislatures make laws, new issues inevitably arise.

Employment

AARP will continue to monitor decisions of the courts of appeals for cases that could reach the Supreme Court. In the meantime, AARP’s efforts on behalf of older workers will be concentrated on persuading Congress to pass the Protecting Older Workers Against Discrimination Act (POWADA) (S. 1391, H.R. 2852), which was reintroduced in both the House and Senate on July 30, 2013. This legislation repeals the Supreme Court’s 2009 decision Gross v. FBL Financial Services, Inc., which held that mixed-motives claims cannot be pursued under the ADEA and that ADEA plaintiffs claiming intentional discrimination must prove that age was the “but-for” cause of the adverse employment decision. This burden is substantially higher than that which Title VII plaintiffs claiming discrimination must satisfy. In an alarming development, this past Term in Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013), the Court imposed that same high burden of proof on employees claiming retaliation under Title VII, a decision that enactment of the POWADA would also remedy.

Health

Medicaid

As of the date of this publication, there is currently only one healthcare-related case with a pending petition for certiorari before the Supreme Court. In Harris v. Quinn, 656 F.3d 692 (7th Cir. 2011), petition for cert. filed, __ U.S.L.W.__ (U.S. Nov. 29, 2011) (No. 11-681), the issue pending is whether, consistent with the First and Fourteenth Amendments, a state may compel in-home personal care assistants paid by Medicaid to accept and financially support a private organization as their exclusive collective bargaining representative. Plaintiffs are personal assistants who provide in-home care to individuals.
enrolled in Illinois’ Medicaid waiver programs. Despite plaintiffs’ choice not to unionize, the state designated personal assistants as “public employees” solely for coverage under the state’s labor relations act and designated the Service Employees International Union (SEIU) as the personal assistants’ exclusive representative for the purposes of bargaining with the state. Under the “fair share” provisions in the collective bargaining agreements between the state and SEIU, plaintiffs were required to pay a proportionate share of the collective bargaining process costs.

Plaintiffs filed a class action claiming that they were not public employees subject to Supreme Court precedent permitting the designation of exclusive representatives for public employees; rather, they were private employees of the individual Medicaid providers. Further, plaintiffs argued that the First Amendment prohibited the state from compelling them to associate or to appoint an exclusive representative to petition the government for the redress of grievances. The district court dismissed the complaint and the Seventh Circuit affirmed the dismissal, holding that personal assistants are jointly employed by the service recipients and the state and; therefore, personal assistants fall within the meaning of public employee and are subject to Supreme Court precedent. The Supreme Court invited the Solicitor General to file a brief expressing the government’s views on the plaintiffs’ petition. The Solicitor General agreed with the Seventh Circuit’s opinion and recommended that certiorari be denied. After being listed for conference three times, the case is set for conference again in late September.

A critical issue the Supreme Court may take up again relates to the rights of Medicaid beneficiaries and providers to bring lawsuits on Supremacy Clause grounds enjoining state laws or policies that conflict with the federal Medicaid statute. In Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204 (2012), the Court in a 5-4 decision declined to answer the question. The California Association of Rural Health Clinics raised the preemption issue again in Cal. Ass’n of Rural Health Clinics v. Douglas, Nos. 10-17574 and 10-17622, 2013 U.S. App. LEXIS 13651 (9th Cir. July 5, 2013), while challenging cuts in various healthcare services as conflicting with federal law. The Ninth Circuit held that the clinics had a private cause of action to challenge state cuts under 42 U.S.C § 1983 but did not rule on the Supremacy Clause issue. The state filed a petition for rehearing en banc on July 19, 2013.

Another case that could play a role if the undecided issue in Douglas gets to the Court is Wos v. E. M. A., 133 S. Ct. 1391 (2013), which involved a claim against the Secretary of the North Carolina Department of Health and Human
Services for placing a lien on a tort recovery pursuant to a North Carolina statute which E.M.A. alleged was inconsistent with federal law. E.M.A. is an individual born with severe birth injuries which prevent her from being able to work, live independently or provide for her basic needs. For relief from her injuries, E.M.A. sued the physician and the hospital for medical malpractice claims and recovered $2.8 million in a settlement. North Carolina law contains an irrebuttable statutory presumption that one-third of a Medicaid beneficiary’s tort recovery is attributable to medical expenses, which led the state to place a lien on that amount. E.M.A. filed suit in federal district court under a § 1983 cause of action, alleging the North Carolina statutory presumption is inconsistent with the Medicaid statute’s anti-lien provision, § 1396p(a)(1), and thus violates the Supremacy Clause. The district court sided with the Secretary, and E.M.A. appealed, where the Fourth Circuit vacated and remanded.

The Supreme Court affirmed the Fourth Circuit judgment in support of E.M.A. The opinion is notable for its divergence in reasoning from the Douglas dissent. The Douglas dissenters stated the rights of individuals to claim federal preemption based on Spending Clause statutes differs from business preemption cases, but Justice Kennedy applied several business preemption cases as precedential for the Wos decision. Id. at 1398, 1400. The issue of whether an individual may use the Supremacy Clause to supply a right of action to enforce a right in a Spending Clause statute such as Medicaid remains to be decided.

**Affordable Care Act**

Since the Supreme Court’s opinion in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), various legal challenges to the Patient Protection and Affordable Care Act (“ACA”) have made their way up to the circuit courts of appeal, setting the stage for the Supreme Court to take up another challenge to the ACA in its 2013 Term if the Court so chooses. One of those challenges involves the ACA’s requirement that certain employers provide full-time employees with a minimum level of health insurance that is affordable, or make a payment to the IRS for failure to do so. This provision of the ACA is known as the employer mandate, and it was not at issue in *NFIB v. Sebelius*.

The plaintiffs in *Liberty University v. Lew*, No. 10-2347, 2013 U.S. App. LEXIS 14052 (4th Cir. July 11, 2013), challenged both the individual mandate and the employer mandate. Liberty argued that the employer mandate was unconstitutional because it forces employers to engage in commercial conduct or buy an unwanted product. The Fourth Circuit disagreed, holding that the employer mandate is not creating commerce, but is simply another example of
Congress’ longstanding authority to regulate employee compensation offered and paid for by employers engaged in interstate commerce. As such, the Fourth Circuit held that the employer mandate was a permissible use of Congress’ power to regulate interstate commerce. Further, the court rejected the plaintiffs’ claim that this holding would create a new and potentially vast domain of congressional authority, because mandating that employers provide a minimum level of health insurance is similar to mandating that employers pay a minimum wage.

The Fourth Circuit also upheld the employer mandate as a valid use of the taxing power, reasoning that the employer payment is permissible because it functions like a tax: the employer mandate payment is assessed and collected by the IRS in the same manner as a tax, it lacks a scienter requirement, it does not punish unlawful conduct, and it leaves employers with a choice of either complying with the mandate or paying the tax. Notwithstanding the Fourth Circuit’s opinion that the employer mandate does not run afoul of NFIB’s teachings, plaintiffs’ have indicated their intent to petition the Supreme Court for certiorari. The petition is due no later than October 4.

The Supreme Court is also likely to consider cases challenging ACA implementing regulations which require that contraceptive services be covered as part of employer-sponsored health care plans. In *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2013 U.S. App. LEXIS 13316 (10th Cir. June 27, 2013), and *Conestoga Wood Specialties Corp. v. HHS*, No. 13-1144, 2013 U.S. App. LEXIS 15238 (3rd Cir. July 26, 2013), the companies sought to preliminarily enjoin HHS from enforcing these regulations because the companies’ owners held religious beliefs which prohibit any participation in acts that involve destroying a fertilized embryo, as some contraceptive devices do. The issue in these cases is whether privately held for-profit companies are protected by the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act (“RFRA”). In *Hobby Lobby*, the Tenth Circuit reversed the district court’s denial of an injunction and held that corporations are persons for purposes of the RFRA and that Free Exercise rights may extend to some for-profit organizations, namely those that run their businesses based on religious principles. The Tenth Circuit remanded the case for consideration of two other injunction factors and, on remand, the district court granted the preliminary injunction. However, the district court stayed the case until October 1, giving the government time to decide whether it would appeal the Tenth Circuit’s decision to the Supreme Court. That petition would be due September 16. In *Conestoga Wood*, the Third Circuit reached a very different conclusion, affirming the denial of an injunction and holding that for-profit secular companies cannot engage in
the exercise of religion under the Free Exercise Clause or the RFRA. As such, plaintiffs did not have a viable claim because it is the corporation that has the obligation to provide health coverage and not the owners of the corporations. The plaintiffs’ request for rehearing in *Conestoga Wood* was denied. The due date for filing a petition for certiorari is November 12.

Because the Third and Tenth Circuit Courts of Appeal have ruled differently on the same issue, it is likely that the government will petition the Supreme Court for certiorari. Additionally, there are other cases pending in the district and appellate courts still under consideration and awaiting a decision on this same issue—one that must be resolved before implementation of the employer mandate. It is also likely that the Court will grant certiorari because this is an issue of first impression for the Court. When the Supreme Court denied Hobby Lobby’s petition for an injunction under the All Writs Act at an earlier stage of the proceedings, it noted that plaintiffs’ claim under the Free Exercise Clause and the RFRA were not “indisputably clear” and that “[t]his court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders . . . .” *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 643 (2012) (Sotomayor, J., in chambers). Although contraception is not an issue impacting AARP advocacy, the implications for health care options for older Americans if the ultimate decision is to exempt contraception from minimum mandatory insurance coverage could be profound. Future challenges to the ACA based on religious objections could, for example, include objections to coverage for palliative care and treatments for diseases that include embryonic stem cells.

Also among ACA court cases are those challenging premium tax credits for low income persons, commonly referred to as subsidies. Even though these cases are still in the district courts, they are notable because they could impact the ACA’s targeted goal of making health insurance broadly available to those within 100 to 400 percent of the poverty level. In *Okla. ex rel. Pruitt v. Sebelius*, 6:11-cv-030-RAW (E.D. Okla.), the Attorney General argues that these subsidies are only available to individuals in states that operate their own Exchanges and not available to those who will get coverage through a federal Exchange. And, in *Halbig v. Sebelius*, 1:13-cv-623 (D.D.C.), plaintiffs base their claim on § 1321(c) of the ACA, which provides that subsidies are available to individuals enrolled in an Exchange "established by the state under section 1311" of the ACA. Plaintiffs argue that this reflects Congress’ intent to limit the subsidies to only those receiving insurance through state operated Exchanges. However, IRS regulations provide for subsidies to be available to individuals enrolling through state or federal Exchanges. See 45 C.F.R. § 155.20 (defining Exchange). The
courts will decide if the IRS interpretation of the statute is due deference over the objection of challengers.

Intellectual Property

Last Term, the Court issued two opinions that could raise related issues for consideration. In *Association for Molecular Pathology v. Myriad Genetics*, 133 S. Ct. 2107 (2013), the Court determined what is patentable in the world of genetic testing. Myriad claimed several patents of both naturally occurring (DNA) and synthetic (cDNA) genes following its successful isolation of the BRCA1 and BRCA2 genes, which can be used as a marker for a patient’s risk of breast and ovarian cancer. These patents allowed Myriad to remain the exclusive provider of BRCA genetic testing in the United States. Myriad also used these patents to prohibit other labs and medical professionals from conducting tests on BRCA1 and BRCA2 genes, making the price of these tests unaffordable for many Americans. The Supreme Court held that identifying naturally-occurring DNA and separating it from its surrounding genetic material is not eligible for a patent. However, the Court affirmed the lower court’s conclusion that the synthetic cDNA genes are patentable.

Soon after the Court’s decision, two of Myriad’s competitors began to promote their own versions of genetic testing on the BRCA1 and BRCA2 genes at far lower prices. Myriad filed suit, alleging infringement of its patents on synthetic cDNA that it says are necessary for genetic testing. A ruling in that suit may eventually reach the Court.

On June 17, 2013, the Court issued its opinion in *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), concerning the legality of “reverse payment” or “pay-for-delay” agreements under the federal antitrust laws. The Court held that the anticompetitive consequences of these agreements “will at least sometimes prove unjustified” under antitrust laws. However, the Court declined to presume the illegality of reverse payment agreements, applying instead a “rule of reason” that would examine several factors, including the size of the payment and its scale in relation to other services rendered and anticipated future litigation costs. The Court remanded the case to the district court for consideration of these factors. Future related cases may reach the Court.
ERISA, Employee Benefits and Investor Protection

There is one pending petition for certiorari before the Supreme Court which AARP has been following due to its potential impact on participants. Since the collapse of Enron and WorldCom, there has been substantial litigation over employer securities as investments in 401(k) plans. In particular, litigation has focused on the appropriate standards when reviewing the decision to include and keep employer securities as an investment option in these plans and at what stage of litigation those standards should be applied. The petition for certiorari in *Dudenhoefer v. Fifth Third Bancorp.*, 692 F.3d 410 (6th Cir. 2012), *petition for cert. filed, ___ U.S.L.W. ___* (U.S. Dec. 14, 2012) (No. 12-751), presents two questions. The first is when does the presumption of prudence (or compliance) (which originated in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995)) apply – at the motion to dismiss stage or later at the summary judgment stage when the facts are developed. There is a split in the circuits on this issue with the Sixth Circuit standing alone in not applying a heightened pleading standard at the motion to dismiss stage. The second issue, which has not previously been decided in any published ERISA appellate decision, is whether the plan fiduciaries’ decision to cite to public companies’ statutorily required (and possibly misleading) SEC filings in the SPD was a "fiduciary act" subject to ERISA liability. The Court has requested the Solicitor General to present the government’s views as to the cert petition in this case.

Several other issues are likely to surface as outgrowths of recent Supreme Court decisions, particularly in ERISA plan interpretation, remedies for fiduciary breach, and the overall reach of ERISA’s anti-retaliation provision.

In the Court’s decision in *Conkright v. Frommert*, 559 U.S. 506 (2010), the Court endorsed a rule of deference to the plan administrator’s interpretation of plan terms where the plan grants discretion to the administrator, even in the wake of a court finding that a previous plan interpretation by the administrator at an earlier stage in the controversy was erroneous. In *Conkright* the Court sent the case back to the plan administrator for another look at the plan’s meaning. The courts below have been struggling with the limits of this holding, and so it seems likely that in an upcoming case the Court will address the reach of *Conkright*.

Similarly, the Court in *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), held that the ERISA section under which benefit claim denials are challenged does not authorize relief for misrepresentations made in a pension summary plan description (SPD). The *Amara* Court rejected the argument that the terms of the
SPD are themselves part of the plan so a claim for relief may not be grounded on SPD language; however, the Court did explicitly approve the notion that equitable relief authorized under ERISA does refer to categories of relief that were “typically available” in equity courts before the merger of law and equity. In that vein, the Court appeared to state a premise that the district court had the authority to grant traditional equitable remedies, such as reformation of contract, estoppel, and surcharge.

Recent cases indicate that Amara has raised as many questions as it answered. In Skinner v. Northrop Grumman Ret. Plan B, 673 F.3d 1162 (9th Cir. 2012), the court found that although the administrative committee for the plan did not ensure that participants received accurate SPDs that explained the circumstances that could result in the benefit offset, the employees were not entitled to either reformation or surcharge as remedies because the participants did not prove that they were intentionally mislead. In contrast is the case of McCravy v. Metro. Life Ins. Co., 690 F.3d 176 (4th Cir. 2012). McCravy's daughter, who had been a covered dependent under the plan, was murdered in 2007. At that time, she was too old to be a covered dependent, but McCravy allegedly did not learn of her daughter's ineligibility until MetLife denied her claim for benefits. McCravy claimed that MetLife had continued to collect insurance premiums from McCravy and had never told her that her daughter was ineligible for coverage. McCravy requested in her ERISA lawsuit that MetLife be ordered to pay her the benefits as a remedy for MetLife's fiduciary breaches. The Fourth Circuit held that Amara was a “striking development” and the current case was exactly the type of case in which monetary relief should be available. Accord, Gearlds v. Entergy Servs., 709 F.3d 448 (5th Cir. 2013); Kenseth v. Dean Health Plan, Inc., 2013 U.S. App. LEXIS 12083 (7th Cir. June 13, 2013). There have also been a number of cases where the SPD includes a discretionary clause, but the plan document does not; the courts have refused to apply the clause. See e.g., Eugene S. v. Horizon Blue Cross Blue Shield of N.J., 663 F.3d 1124 (10th Cir. 2011); Kaufmann v. Prudential Ins. Co. of Am., 840 F.Supp. 2d 495 (D.N.H. 2012); but see Langlois v. Metro. Life Ins. Co., 833 F.Supp. 2d 1182 (N.D. Cal. 2011) (suggesting that the court can look to SPD to ascertain whether discretionary authority was conferred). Similarly, where exclusions are not in the SPD, but are in the plan document, they will not be enforced. We also expect cases concerning the burden of proof and causation will be among those issues that may eventually reach the Court.

Finally, last Term’s decision in U.S. Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013), holding that equitable principles will not override express unambiguous plan terms, has already generated a fair amount of litigation
concerning what plan language is needed for a plan to obtain reimbursement and avoid a participant’s equitable defenses. Among potential issues are whether a plan’s terms are ambiguous, the difference between silence and ambiguity of terms, and whether a plan can obtain reimbursement if the money has been spent. We believe that it will take a few years of decisions to clarify the law on these issues.

In the last few years, the Court has decided many cases concerning the scope of the anti-retaliation provision under various statutes, resulting in employee-friendly decisions. Currently, there is a split in the circuits concerning whether ERISA’s anti-retaliation provision permits an employer to discharge an employee for making unsolicited internal complaints regarding violations of the statute. The Court ducked this question during the 2010 Term, denying certiorari in *Edwards v. A. H. Cornell and Son, Inc.*, 131 S. Ct. 1604 (2011), but the issue is currently in front of the U.S. Court of Appeals for the Sixth Circuit, *Sexton v. Panel Processing, Inc.*, 912 F. Supp. 2d. 457 (E.D. Mich. 2012), on appeal, Docket No. 13-1604 (6th Cir.), and begs for the Court’s attention.

There also is no consensus among the circuits concerning who may be sued as a defendant under ERISA § 502(a)(1). In *Cyr v. Reliance Std. Life Ins. Co.*, 642 F.3d 1202 (9th Cir. 2011), the court held that entities other than an ERISA plan or plan administrator may be sued in ERISA benefit actions under the law’s civil enforcement provision because there was no limitation in the statute. *Accord, LifeCare Mgmt. Servs. LLC v. Ins. Mgmt. Adm’rs*, 703 F.3d 835 (5th Cir. 2013) (collecting cases).

In the Investor Protection realm, *Troice* and *UBS* continue to tease out the Court’s inclinations, limits, and scrutiny as to holdings that erect barriers for shareholders to challenge the conduct of public corporations and their directors; we believe that cases concerning these boundaries will continue to percolate up to the Court in the next few years.

**Disability**

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) reversed the Supreme Court’s narrow reading of the statute’s original language defining “disability,” thereby expanding the coverage of the ADA. Following Congress’ directions, the federal courts have similarly broadened their reading of the coverage of the Rehabilitation Act of 1973. Since early 2011, federal courts also have had the benefit of final regulations implementing the ADAAA issued by the EEOC. See 76 Fed. Reg. 16,977 (Mar. 25, 2011). Thus far, in cases applying
the “new” definition of disability (or, as some advocates would argue, the “restored” definition), relatively few sharp interpretative disputes have emerged. It may be at least a few years before any such disputes rise to the level of Supreme Court consideration.

Meanwhile, many ADA and Rehabilitation Act issues long ignored or left unaddressed by the federal courts are moving to the forefront, as fewer cases are being dismissed based on a threshold determination that complainants cannot satisfy the definition of “disability.” Among the most hotly disputed matters in this arena are questions of the nature and scope of workplace, policy or program modifications necessary to satisfy statutory requirements of “reasonable accommodation.” The ADAAA, after all, addressed this issue only tangentially.

One example of a reasonable accommodation issue that may soon come before the Court is a question that has reached the Court before: if a disability prevents an employee from performing the essential functions of his or her current position even with accommodation, does the ADA (or Rehabilitation Act) require an employer to reassign a qualified disabled employee to a vacant position as a “reasonable accommodation” even though applying the employer’s policy of selecting the “best-qualified” candidate for any job opening would entitle another, non-disabled individual to the position? The Court recently declined to hear such a case in which an employer sought to overturn a Court of Appeals decision that the ADA did require such an accommodation. *EEOC v. United Airlines*, 693 F.3d 760 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2734 (May 28, 2013) (No. 12-707). In its decision, the Seventh Circuit disavowed its prior ruling to the contrary in *EEOC v. Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000), in light of the Supreme Court’s intervening decision in *U.S. Airways v. Barnett*, 535 U.S. 391 (2002). Several years ago, the Court took a case presenting the same issue, in which a judgment in favor of a disabled worker secured her transfer to a vacant position. The Court of Appeals reversed based on *Humiston-Keelling*, despite contrary reasoning in *Smith v. Midland Brake, Inc.*, 180 F.3d 1154 (10th Cir. 1999) (en banc). The Supreme Court dismissed certiorari, however, when the parties reached a settlement. *Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir.), *cert. granted*, 552 U.S. 1074 (2007), *cert. dismissed*, 552 U.S. 1136 (2008). Although *Huber’s* underpinnings have been undermined, a circuit split remains. Thus, it is uncertain whether the Supreme Court will take up the issue again, unless or until another appeals court follows *Huber*, despite the Seventh Circuit’s about-face in *EEOC v. United Airlines*. 
Consumer

Over the last several years, the Court has dealt serious blows to enforcement of a wide variety of state and federal laws designed to safeguard individuals from unfair and deceptive practices and to protect their financial security, safety, employment, and civil rights. In the 2012 Term, the Court ruled that even a manifest congressional intent to promote effective vindication of statutory rights is no bar to enforcement of a mandatory arbitration clause in a contract, thereby limiting legal recourse in the courts for consumers, employees, and others for whom the remedies available in arbitration forums may be seen as inadequate to redress unlawful practices. Mandatory arbitration clauses are widely used in consumer contracts, preventing claims from being heard in court, often precluding the aggregation of claims into class actions and sometimes deterring claims from being brought at all. The proliferation of mandatory arbitration clauses threatens enforcement of many statutory or civil rights and limits the likelihood that the Court will address substantive consumer protection issues anytime soon.

We would not be surprised if regulatory and enforcement actions taken by the Consumer Financial Protection Bureau (CFPB) generate litigation which reaches the Court. The CFPB has begun to enforce regulations to protect debtors from unfair debt collection practices. These practices range from selling invalid debts and failing to properly supervise the activity of collectors in collecting those debts to the filing of lawsuits based on robo-signed affidavits where the sworn statements were unverified.

Housing

As explained in the case note on Mt. Holly Gardens, at 19, supra, the most important fair housing issue before the Court in recent years is whether the Fair Housing Act (FHA) permits a challenge to a facially neutral policy or practice where it has a disparately negative impact on a protected class. We are aware of at least one other case raising the same issue currently on appeal. Inclusive Cmtys. Project, Inc. v. Tex. Dept of Hous. & Cmty. Affairs, 860 F. Supp. 2d (N.D. Tex. 2012), appeal docketed, No. 12-11211 (5th Cir. Dec. 4, 2012). Given that the Court has granted certiorari on this issue in two different cases in the last two years, it is evident that the Court believes it needs to weigh in on this issue.

Relatedly, HUD finalized a regulation affirming the use of the disparate impact theory of liability under the FHA. See Implementation of the Fair Housing Act’s Discriminatory Effects Standard, 78 Fed. Reg. 11,460 (Feb. 15, 2013) (to
be codified at 24 C.F.R. pt. 100). A lawsuit challenging HUD’s authority to issue the rule under the Administrative Procedure Act and the FHA was filed in June 2013 in the U.S. District Court for the District of Columbia. See *American Insurance Association v. HUD*, No. 1:13-cv-00966 (D.D.C. June 26, 2013.) The controversy surrounding this issue suggests that a decision will be appealed to the circuit court with the Court potentially facing a petition for certiorari.

HUD recently issued another proposed rule which also may be challenged. *See Affirmatively Furthering Fair Housing*, 78 Fed. Reg. 43,709 (July 19, 2013). The FHA obligates HUD to administer federal grants to local jurisdictions to “affirmatively further fair housing.” Although HUD regulations have long required jurisdictions receiving HUD administered funds, including billions of dollars of Community Development Block Grants, to certify that they are spending them to affirmatively further fair housing, HUD has never defined, through regulation, the scope of this obligation. In recent years, litigation and administrative complaints filed with HUD by fair housing advocates have successfully challenged such certifications by showing that federal funds have not been administered to improve housing opportunity for protected classes or to eliminate marketplace practices that impede fair housing choice. Such challenges have forced several large jurisdictions to increase the supply of affordable housing and to otherwise address impediments to housing opportunities for protected classes. HUD’s proposed rule provides more guidance to HUD grantees regarding methods of compliance with these obligations to affirmatively further fair housing. HUD is also providing grantees with greater access to demographic and housing information to enable jurisdictions to more efficiently evaluate impediments to fair housing and to address such impediments. The proposed rule also seeks to improve public participation in the decision making process, especially among stakeholders and members of protected classes. HUD’s attempt to finalize this regulation may lead to litigation over HUD’s authority to issue the regulation and/or its substantive provisions.

**Voting and Campaign Finance**

Political and legal events in the aftermath of *Inter-Tribal Council of Arizona, Inc. v. Arizona*, 133 S. Ct. 2247 (June 17, 2013), and *Shelby County v. Holder*, 133 S. Ct. 2612 (June 25, 2013), suggest the Supreme Court will address similar voting rights issues again in the near future. The Court’s decision in *Shelby County* striking down the coverage formula established in Section 4 of the Voting Rights Act for determining which political jurisdictions must comply with Section 5 of the Act portends a future case in which the Court is asked to address the legality of a revised coverage formula, if and when Congress agrees on one.
Further, following *Shelby County*, photo ID voting requirements enacted in Texas and South Carolina no longer must conform to the rulings of federal courts regarding the legality of such requirements under Section 5. Within hours of the Shelby County decision, Texas officials announced their intent to enforce the law struck down under Section 5. See *State of Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012). The Supreme Court vacated the lower court’s ruling, and Texas has moved to dismiss the case. Meanwhile, the United States and civil rights groups filed papers in federal court in Texas in a long-running legislative redistricting case seeking an order requiring Texas once again to be subject to Section 5 preclearance due to its alleged history of racial and ethnic discrimination in voting procedures. See *Perez v. State of Texas*, No. 11-360 (W.D. Tex.). South Carolina won its preclearance fight with the United States, but in a manner one judge described as reflecting great sensitivity on the part of state legislators to prohibitions imposed by Section 5 of the Voting Rights Act. See *South Carolina v. United States*, 898 F. Supp. 2d 30 (D.D.C. 2012). As yet, however, state officials have not moved to modify the law they enacted so as to avoid an adverse ruling under Section 5. Finally, voter ID laws have been enacted in the past year in numerous other states. Thus far, legal challenges have been mounted to such laws in Kansas and North Carolina. One or more of these cases is likely to come before the Supreme Court in the next few years.

New challenges to campaign finance restrictions continue to appear, building on the reasoning of the Supreme Court’s decision in *Citizens United*. An issue that may generate petitions for certiorari in the future concerns state laws regulating registration and disclosure of non-profit groups, including those created under section 501(c)4) of the Internal Revenue Code. A split among various federal circuit courts of appeal exists as to the scope of permissible federal regulation of such groups.

Most recently, in September 2012, a panel of the U.S. Court of Appeals for the Seventh Circuit upheld the Illinois campaign finance disclosure rule requiring registration and disclosure of 501(c)(4) organizations even if their “major purpose” is other than influencing elections. The court ruled 2-1, with Judge Richard Posner dissenting in part, that several challenged provisions of Illinois law were not unconstitutionally vague and overbroad, and thus, did not violate the First Amendment to the U.S. Constitution. *Center for Individual Freedom v. Madigan*, 694 F.3d 464 (7th Cir. 2012).

*Center for Individual Freedom* involved challenges to state registration and disclosure provisions premised on the assertion that after *Citizens United*, they are “facially unconstitutional.” The court noted that in prior suits against such
restrictions (under federal or state law) to reach the federal appellate courts since *Citizens United*, state disclosure limits, even those that extend beyond federal law, generally have been sustained.

The provisions disputed in *Center for Individual Freedom* included rules similar in some respects to those in federal law, but also different, in that they: “(1) cover election activity relating to ballot initiatives, which have no federal analog; (2) do not exempt from regulation those groups that lack the ‘major purpose’ of influencing electoral campaigns; and (3) cover campaign-related advertisements that appear on the internet.”

In particular, the Court of Appeals’ decision upholding such rules is significant because it applies to groups whose "major purpose" is not influencing electoral campaigns. These 501(c)(4) organizations are exempt from federal campaign finance disclosure rules, and accordingly, many campaign finance advocates contend that such entities have been established with the intent of shielding donors from disclosure. In *Center for Individual Freedom*, the court declared that such groups must disclose donors under state law, if not under federal law.

In this regard, *Center for Individual Freedom* diverges from rulings of at least two other courts of appeals. In *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), decided prior to *Citizens United*, the Court of Appeals held that "an entity must have 'the major purpose' of supporting or opposing a candidate to be designated a political committee" subject to state disclosure requirements. Hence, the Fourth Circuit recognized a conflict with the First Amendment and invalidated several provisions of a state campaign finance disclosure law. Similarly, in *New Mexico Youth Organized v. Herrera*, 611 F.3d 669 (10th Cir. 2010), the court barred application of a state disclosure law to the NMYO because that group did not "satisfy the 'major purpose' test." The Tenth Circuit explained that such a standard "sets the lower bounds for when regulation as a political committee is constitutionally permissible."

**Litigation Rules And Procedures**

AARP Foundation Litigation will vigorously oppose proposed changes to the Federal Rules of Civil Procedure submitted by the Judicial Conference of the United States. If approved by the Supreme Court and Congress, the proposed rule changes would impose unreasonable limits on the pre-trial discovery process that seem specifically designed to severely limit the ability of plaintiffs in most civil cases, including those alleging employment discrimination, to obtain
relevant information, which in the vast majority of cases is solely in possession of defendants. There is no evidence whatsoever that the discovery process under the current rules is not working as designed or is unfair to defendants. AARP Foundation Litigation submitted comments opposing the proposed changes during the first phase of the review process in January 2013, and Foundation Litigation intends to do so again in the next phase of the public comment period.
CONCLUSION

Supreme Court decisions will impact a larger percentage of the American population as the number of individuals over age 50 increases. AARP Foundation Litigation, through its active amicus participation in the Supreme Court, has and will continue to ensure that the Court is fully briefed on the concerns of this population. Participation in these cases is an integral part of AARP Foundation Litigation’s advocacy, and Foundation Litigation will continue to apprise the Court of AARP’s views.